

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE S. JAMES OTERO, U.S. DISTRICT JUDGE

5 STEPHANIE CLIFFORD a.k.a. STORMY )  
6 DANIELS a.k.a. PEGGY PETERSON, an )  
individual, )  
7 Plaintiff, ) Case No.  
8 vs. ) 2:18-cv-02217-SJO-FFM  
9 DONALD J. TRUMP a.k.a. DAVID )  
DENNISON, an individual, ESSENTIAL )  
CONSULTANTS, LLC, a Delaware Limited )  
Liability Company, MICHAEL COHEN, an )  
individual, and DOES 1 through 10, )  
inclusive, )  
12 )  
13 Defendants. )  
14 STEPHANIE CLIFFORD a.k.a. STORMY )  
15 DANIELS, )  
16 Plaintiff, ) Case No.  
17 vs. ) 2:18-cv-06893-SJO-FFM  
18 DONALD J. TRUMP, )  
19 Defendant. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
FRIDAY, MONDAY, SEPTEMBER 24, 2018  
1:57 P.M.  
LOS ANGELES, CALIFORNIA

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1                   **LOS ANGELES, CALIFORNIA; FRIDAY, MONDAY, SEPTEMBER 24, 2018**

2                   **1:57 P.M.**

3                   **--oo--**

4                   THE COURTROOM DEPUTY: Calling Item No. 9:

5                   Case number CV 18-02217 SJO; Stephanie Clifford versus Donald  
6                   J. Trump, et al. And also calling Item No. 10: Case number  
7                   CV 18-06893 SJO; Stephanie Clifford versus Donald J. Trump.

8                   Counsel, please state your appearances.

9                   MR. AVENATTI: Good afternoon, Your Honor. Michael  
10                  Avenatti on behalf of the plaintiff, Stephanie Clifford.

11                  MR. IBRAHIM: Good afternoon, Your Honor. Ahmed  
12                  Ibrahim on behalf of plaintiff Stephanie Clifford in both  
13                  cases.

14                  THE COURT: Good afternoon.

15                  MR. HARDER: Good afternoon, Your Honor. Charles  
16                  Harder on behalf of President Donald J. Trump.

17                  MR. STONEROCK: Good afternoon, Your Honor. Ryan  
18                  Stonerock on behalf of defendant Donald Trump.

19                  MR. BLAKELY: Good afternoon, Your Honor. Brent  
20                  Blakely on behalf of Michael Cohen and Essential Consultants.

21                  MS. COVINGTON: Good afternoon, Your Honor. Jessica  
22                  Covington on behalf of Michael Cohen and Essential Consultants.

23                  THE COURT: Good afternoon, everyone.

24                  So the matter is here on a scheduling conference in case  
25                  number CV 2217, which we will put aside for the time being, and

1 then we also have the matter here on defendant's, Mr. Trump's,  
2 special motion to dismiss Ms. Clifford's complaint for  
3 defamation.

4 I think some procedural history is probably in order here.  
5 The subject complaint by Ms. Clifford was filed in the Central  
6 District of -- I'm sorry, the Southern District of New York.  
7 The defendant, Mr. Trump, moved to transfer the case from the  
8 Southern District of New York to this Court because the claim  
9 was it relates to litigation already in this court, and that  
10 was the CV 02217 case.

11 The parties thereafter met and conferred, and there was a  
12 stipulation to transfer the matter in the Southern District to  
13 this Court, and then Judge Furman issued that order granting  
14 the transfer, and this Court accepted the transfer, so the  
15 matter is here.

16 There was a comment by one of the bloggers that this Court  
17 must have done something bad in the past to inherit all these  
18 cases, and I -- such as running over a nun or something. I  
19 just want to make clear, I enjoy First Amendment matters. The  
20 lawyers in the proceedings before me, I think, have been  
21 professional in court, have been very professional, so I enjoy  
22 the lawyers who have participated in the proceedings here. And  
23 I was a product of Catholic school, so I would not run over a  
24 nun.

25 So the issue before the Court is -- involves certain

1 foundational matters. Ms. Clifford's defamation lawsuit, the  
2 subject lawsuit, concerns an April 2018 tweet posted by  
3 Mr. Trump from his personal Twitter account regarding  
4 Ms. Clifford and an artist sketch of a man Ms. Clifford claims  
5 threatened her in 2011 because she had agreed to cooperate with  
6 a magazine in connection with an article about her prior  
7 intimate relationship with -- or alleged intimate relationship  
8 with Mr. Trump.

9 So in the complaint that has been filed in court,  
10 Ms. Clifford claims that in 2011, while she was in Nevada,  
11 Las Vegas, a person, a man, approached her and her infant  
12 daughter and threatened Ms. Clifford, told her to leave Trump  
13 alone and forget the story. Thereafter, Mr. Trump was elected  
14 president in 2016.

15 And then in 2018, Ms. Clifford worked with an artist to  
16 render a sketch of a person who had allegedly threatened her in  
17 2011. Thereafter, Ms. Clifford released the sketch on April  
18 17th, 2018, and the next day, April 18th, Mr. Trump -- then  
19 President Trump or now President Trump -- posted what is  
20 claimed to be false statements regarding Ms. Clifford's sketch  
21 and Ms. Clifford's account of the threatening incident.

22 So the subject tweet posted by President Trump was -- or  
23 reads: "A sketch years later about a nonexistent man, a total  
24 con job playing the fake news media for fools," in parens, "but  
25 they knew it."

1           It should be referenced, as referenced in the complaint,  
2 that President Trump's tweet was posted in response to another  
3 tweet which was by another person, which showed side-by-side  
4 images of the sketch released by Ms. Clifford and then a  
5 picture of Ms. Clifford's then husband, and the inference being  
6 that the two looked alike.

7           Based on the tweet by Mr. Trump, Ms. Clifford has sued  
8 Mr. Trump for defamation, and she argues that the tweet attacks  
9 the veracity -- her veracity of her account regarding the  
10 incident that took place or allegedly took place back in 2011,  
11 that Mr. Trump meant to convey that Ms. Clifford is a liar, and  
12 that she was falsely accusing the man depicted in the sketch of  
13 committing a crime.

14           And there's a claim in the complaint that the tweet  
15 constitutes defamation, per se, because it charges her with  
16 committing a crime under New York law as well as the law of  
17 other states. So she claims to have been damaged as a result  
18 of the tweet, including exposing her to ridicule and threats  
19 and hatred and contempt.

20           So before we get to the substance of the issues that are  
21 raised in the pleading, there are certain substantive -- there  
22 are certain threshold questions that need to be addressed  
23 before we get to the substantive issues, and the first is the  
24 choice of law. The Court has determined which state law  
25 governs the special motion that has been filed in this case.

1 So, not surprisingly, Mr. Trump claims that Texas law, the  
2 Texas anti-SLAPP statute applies, and it's not surprising that  
3 Ms. Clifford argues that the New York law applies.  
4 Ms. Clifford argues that the New York law applies because  
5 Mr. Trump was a citizen of New York or is a citizen of New York  
6 and not Texas.

7 The law that applies is important because the Texas  
8 anti-SLAPP statute is modeled after California, which is an  
9 expansive statute and provides much protection for persons  
10 accused of making defamatory statements in the context that's  
11 before the Court, and then New York law is much narrower and  
12 provides far less protection. So the Court is not surprised  
13 that the parties have taken different positions regarding  
14 application of which law this Court should apply in this case.

15 So we start with where the case was filed. The case, as  
16 mentioned, the complaint -- the subject complaint was filed in  
17 New York and then transferred to this Court because it related  
18 to litigation already pending in this court.

19 And so I think I'll hear from counsel, but I think the  
20 Supreme Court -- U.S. Supreme Court precedent is clear in this  
21 area: When a case is transferred from a federal court in one  
22 state to a federal court in another state, the choice of law  
23 principles that apply are the state from where the case was  
24 transferred. And that's *Van Dusen versus Barrack*,  
25 376 U.S. at 612. In that case there was a transfer by a

1 defendant. That's a 1964 decision.

2 The Supreme Court followed that same reasoning and  
3 rational in *Ferens versus John Deere*, where a plaintiff moved  
4 to transfer. In both cases the Supreme Court made it clear  
5 that the law -- choice of law principles that would apply would  
6 be the law of the state where the matter was first filed.

7 So if Mr. Avenatti disagrees for any reason, I'll hear  
8 from him at this point.

9 MR. AVENATTI: Your Honor, Mr. Ibrahim is going to  
10 be handling this, but we don't disagree.

11 THE COURT: Okay. So that, I think, is pretty  
12 clear.

13 Does counsel for President Trump or Mr. Trump wish to be  
14 heard on this?

15 MR. HARDER: No, Your Honor. We agree.

16 THE COURT: So we start looking at the New York  
17 choice-of-law principles. And under New York choice of law  
18 regarding rules in cases concerning defamation, New York choice  
19 of law, I think, indicates that the plaintiff's domicile will  
20 usually have the most significant relationship to the case, and  
21 it's the domicile of the plaintiff that would control.

22 In the complaint that has been filed here, the plaintiff,  
23 Ms. Clifford, references that she's a resident of Texas, and  
24 the complaint references that the President is a resident of  
25 New York. So the Court has researched the Second District

1 authority -- I'm sorry, the Second Circuit authority regarding  
2 the applicable law that should apply here. And it would appear  
3 that the authority that best guides the Court is *Lee versus*  
4 *Banker's Trust*.

5 In *Lee versus Banker's Trust*, the plaintiff was hired by  
6 Banker's Trust to be a vice president. Thereafter, the  
7 plaintiff was accused of certain conduct that the bank would  
8 not tolerate. The bank ended up discharging the plaintiff. In  
9 discharging the plaintiff, the bank filed a suspicious activity  
10 report with the U.S. Attorney's Office in the Southern District  
11 of New York. Based on the filing of that suspicious activity  
12 report, the plaintiff claimed that the plaintiff was defamed,  
13 and the plaintiff sued.

14 In that lawsuit the district court applied the law of  
15 New Jersey in analyzing the defamation claim and not the law of  
16 New York. The plaintiff appealed and argued that New York law  
17 applied because Banker's Trust was headquartered in New York,  
18 and the defamatory conduct, the filing of the suspicious  
19 activity report, took place in New York; therefore, New York  
20 law applied. And the Court for the Second Circuit disagreed,  
21 making it clear that it was the state where the plaintiff was  
22 domiciled that would control in defamation cases.

23 So the *Lee versus Banker's Trust* stands, in the Court's  
24 view, for the proposition that the Court has to look at where  
25 plaintiff is domiciled in a defamation case to determine the

1 law to apply, whether it's New York law or whether it's Texas  
2 law.

3 Separate and apart from *Lee/Bankers*, the Court has  
4 reviewed the Restatement (Second) of Conflict of Laws. And in  
5 the Restatement (Second) of Conflict of Laws -- this is the  
6 1971 edition -- references that when a natural person claims  
7 that he or she has been defamed by an aggregate communication,  
8 the state of most significant relationship would usually be the  
9 state where the person was domiciled at the time.

10 So I'm interpreting the complaint that has been filed here  
11 to be one where the plaintiff admitted the domicile being in  
12 the state of New York -- I'm sorry, the state of Texas. If  
13 that's the case, then the Court is guided by *Lee versus*  
14 *Banker's Trust* and the Restatement, and it would be Texas  
15 anti-SLAPP statute that would apply and Texas law that would  
16 apply.

17 But before we go on, I will hear from counsel to see if  
18 there's disagreement there, and we can start with Mr. Ibrahim.

19 MR. IBRAHIM: Yes, Your Honor.

20 THE COURT: And if you would argue at the lectern,  
21 please.

22 MR. IBRAHIM: Thank you, Your Honor.

23 While Your Honor was reciting some of the case law that  
24 the Court has researched, I had an opportunity to go back to  
25 some of the briefing, and what I had suspected is, indeed,

1 true, that the *Van Dusen* case and the analysis that Your Honor  
2 and its clerks have engaged in was not briefed for the Court.  
3 That also goes for the *Lee versus Banker's Trust* case.

4 And so absent having all of that authority before me and  
5 all those arguments, I'm going to go ahead and defer to the  
6 Court's analysis on that issue; and, therefore, we would  
7 concede that plaintiff's domicile is in the state of Texas, and  
8 that, therefore, Texas law would apply in this instance.

9 THE COURT: Okay. This is becoming a very easy  
10 hearing.

11 Several pleadings have been filed, especially in reference  
12 to the scheduling conference, so that threshold issue has been  
13 resolved.

14 So the next issue is the Court has to decide whether  
15 Mr. Trump's special motion should be treated as a motion for  
16 summary judgment and guided by -- and whether the Court should  
17 be guided by FRCP Rule 56 or whether the motion is a motion  
18 that is governed by FRCP 12(b)(6), in other words, a motion to  
19 dismiss.

20 The distinction between the two is important because if  
21 the Court treats the motion as a motion for summary judgment,  
22 then under the principles that apply in federal court, the  
23 plaintiff would be allowed to conduct discovery. If the matter  
24 is treated as a 12(b)(6) motion, then the Court is to make a  
25 decision based on the allegations contained in the complaint.

1           So the Court has, in reference to this issue, reviewed the  
2 *Planned Parenthood* case. This is *Planned Parenthood versus*  
3 *Center for Medical Progress*. And so this is a Ninth Circuit  
4 decision. The Court has relied on Ninth Circuit law here  
5 because we could not find any Fifth Circuit law -- Texas being  
6 in the Fifth Circuit -- concerning the issue here. And so the  
7 Texas statute is modeled after the California statute. So it  
8 appears that in the absence of Fifth Circuit law, the Court  
9 should be guided by Ninth Circuit law.

10          So in the *Planned Parenthood* case, the plaintiff,  
11 Planned Parenthood, filed a lawsuit alleging that the  
12 defendant, Center For Medical Progress, created false videos  
13 and used fraudulent means to enter into the premises of  
14 Planned Parenthood to create false videos. The defendant was  
15 sued. The defendant moved to dismiss under 12(b)(6) under the  
16 California anti-SLAPP statute.

17          And in looking at the case, the Court held that the  
18 anti-SLAPP motion only challenges the legal sufficiency of the  
19 complaint; and, therefore, if it only challenged the legal  
20 sufficiency of the complaint, the analytical construct would be  
21 under 12(b)(6). If it challenged the facts as alleged in the  
22 complaint, the veracity of the facts as alleged in the  
23 complaint, it would be a matter that should be governed by  
24 Rule 56, the rules that apply to a motion for a summary  
25 judgment.

1           And so as I understand the motion to strike here made --  
2 offered by the defendants, the motion to strike appears to be  
3 analogous to a motion to dismiss because the defendant seems to  
4 assume the truth of the allegations in the complaint. And the  
5 defendant has made three arguments in support of the motion:  
6 one, the tweet alleged in the complaint is constitutionally  
7 protected opinion; the second category of claim that is being  
8 offered here by the defendant is the plaintiff has not  
9 sufficiently pled facts to support damage; and then the third  
10 is that the plaintiff has not pled sufficient facts to show  
11 that Mr. Trump acted with requisite malice or reckless  
12 disregard.

13           As I understand the complaint, the complaint appears to be  
14 a motion that is best analyzed under 12(b)(6) of the Federal  
15 Rules of Civil Procedure and not Rule 56. Now, that being  
16 said, Mr. Harder has filed a declaration in support of the  
17 special motion to dismiss. And in the declaration in support  
18 of the special motion, Mr. Harder has attached Exhibits A  
19 through F -- I'm sorry, A through S. There are many exhibits  
20 here.

21           And if Mr. Harder believes that the case should be  
22 analyzed as a 12(b)(6) motion and not under 56, the question  
23 is: Well, why did Mr. Harder file all of these exhibits? So  
24 I'll hear from Mr. Harder.

25           MR. HARDER: Thank you, Your Honor.

1           We do believe that under 12(b)(6) you can dismiss out the  
2 entire claim with prejudice for the reasons that we stated. If  
3 Your Honor does not believe that 12(b)(6) is the proper  
4 mechanism to dismiss out, the issue of special damages we  
5 believe can be dismissed out with -- the entire case dismissed  
6 out with prejudice because special damages have been offered by  
7 the plaintiff, Ms. Clifford, and by way of declaration. And  
8 her declaration does not provide sufficient evidence that there  
9 are special damages.

10           And so we would take the position, Your Honor, that  
11 12(b)(6) should be the primary mechanism to evaluate the  
12 motion. And if so, then you don't need to look at any of the  
13 exhibits. If Your Honor does not dismiss out the entire claim  
14 with prejudice based upon 12(b)(6), then we believe that you  
15 have the power to dismiss out the entire claim with prejudice  
16 based upon Rule 56, based upon the evidence as to that special  
17 damages issue.

18           THE COURT: So as I understand it, then, just to  
19 kind of recap, you see this as a 12(b)(6) issue, the analysis  
20 under 12(b)(6), but if the Court disagreed for any reason, then  
21 you filed in support of a motion for summary judgment all of  
22 the exhibits that are attached to your declaration, including A  
23 through S. Is that basically --

24           MR. HARDER: Correct, correct.

25           THE COURT: Okay. So I guess I'll turn it over to

1       Mr. Ibrahim to comment on whether this is -- the analytical  
2 construct here is a 12(b)(6) or a Rule 56.

3                   MR. IBRAHIM: Thank you, Your Honor.

4                   This case was -- or, rather, the motion filed by Mr. Trump  
5 was a motion brought pursuant to the anti-SLAPP provisions of  
6 425.16. And as a result, and because Mr. Trump is not  
7 conceding that that motion is without merit, and as Your Honor  
8 knows, there are serious consequences associated with filing an  
9 anti-SLAPP motion, namely, the award of attorney's fees to a  
10 prevailing party. I don't think that we should disregard the  
11 fact that the actual motion that Mr. Trump has filed is an  
12 anti-SLAPP motion.

13                  And as a result, the assertions made pursuant to that  
14 anti-SLAPP motion is very clear, in our view, that the federal  
15 courts, because the matter is brought in federal court, will  
16 construe an anti-SLAPP motion as a summary judgment motion for  
17 the purposes of determining whether discovery should be  
18 awarded.

19                  And if we take a step back for a second, Your Honor,  
20 Your Honor pointed out that there is this distinction between  
21 motions that test the legal sufficiency of the allegations in a  
22 complaint versus assertions in a motion that are directed to  
23 the facts in evidence. Well, here, in our view, there is no  
24 question that the facts in evidence are implicated, and we need  
25 look no further than the actual tweet that we have.

1           Looking at this actual tweet, which Your Honor recited in  
2 Your Honor's statement of facts, the tweet talks about the  
3 threat that occurred to our client that she reported to the  
4 public with regards to a threat she received in 2011 from this  
5 man. Mr. Trump called that person a, quote, nonexistent man,  
6 end quote, a nonexistent man.

7           THE COURT: I think we are getting beyond the focus  
8 of the Court here. I think everyone in this court agrees this  
9 is an anti-SLAPP motion. I believe it's been conceded that the  
10 Texas anti-SLAPP motion applies, not the statute or the law  
11 that would apply from New York. If we look at the *Planned*  
12 *Parenthood* case that I just cited, it's Ninth Circuit  
13 authority, but, again, the Texas law is modeled after  
14 California law, so we look at the Ninth Circuit authority.

15           And in the Ninth Circuit, the *Planned Parenthood* case  
16 stands for the proposition that an anti-SLAPP motion can be a  
17 motion that's governed by 12(b)(6) or a motion that's governed  
18 by Federal Rules of Civil Procedure 56, a motion for summary  
19 judgment.

20           So the way I've interpreted the motion here, in the motion  
21 Mr. Trump assumes all of the facts alleged in the complaint to  
22 be true. The claim is that the tweet alleged in the complaint  
23 is constitutionally protected opinion. So if that's the case,  
24 then we look only at the complaint itself, and then I can make  
25 a determination, applying Texas law, as to whether the

1 plaintiff has stated a claim of defamation that can go forward.

2 MR. IBRAHIM: Yes, Your Honor, if I may be briefly  
3 heard on this.

4 THE COURT: Yes.

5 MR. IBRAHIM: One of the arguments that defendants  
6 make here, page 14, is plaintiff cannot show actual malice, and  
7 so they are challenging the evidentiary basis of our  
8 allegations because they are asserting that we can't show that  
9 Mr. Trump issued this tweet with actual malice.

10 Now, how are we going to find out whether Mr. Trump made  
11 this tweet with actual malice or not? Obviously we are going  
12 to have to look at the evidence, and among other things we are  
13 going to have to examine: Number one, did Mr. Trump know about  
14 this man who was sent to threaten my client in 2011? Number  
15 two, did Mr. Trump know that this story in In Touch magazine  
16 was about to come out? Number three, did someone within  
17 Mr. Trump's inner circle, did they know about the fact that  
18 this story was going to come out? Did they know about this  
19 man?

20 So these are all, Your Honor -- and I apologize for  
21 interrupting, but my point is that we can't look at this as a  
22 challenge to the pure legal sufficiency of the complaint. They  
23 are clearly making factual arguments, and I haven't even gotten  
24 to the damages portion of it, which is also a question of fact.

25 THE COURT: Okay. I think maybe you're jumping a

1       little bit ahead, but let me hear from Mr. Harder on this.

2                   MR. HARDER: Yes, Your Honor. Thank you.

3                   As I said before -- and, Your Honor, courts -- federal  
4       courts review federal anti-SLAPP motions based on either  
5       12(b)(6) or Rule 56. You can take your choice, and you can  
6       choose both ways if you want to also.

7                   THE COURT: It makes a difference because if this is  
8       a Rule 56 motion analysis, then they are entitled to discovery.

9                   MR. HARDER: I understand, Your Honor. As I said  
10       before, we would like to proceed under 12(b)(6). As to -- if  
11       Your Honor does not dispose of the entire case with prejudice  
12       as to 12(b)(6), we would like to address the special damages  
13       issue only as to Rule 56 with regard to actual malice. We are  
14       willing to withdraw those arguments from the motion, just from  
15       this particular motion, so that it's a cleaner issue to resolve  
16       because I think we can easily resolve the case from the first  
17       two.

18                   THE COURT: So under 12(b)(6) analysis, the Court  
19       would accept all of the allegations in the complaint to be true  
20       and then the determination as to whether the tweet is  
21       constitutionally protected opinion.

22                   MR. HARDER: For purposes of analyzing the motion,  
23       yes.

24                   THE COURT: Yes, for purposes of analyzing the  
25       motion.

1 MR. HARDER: Correct.

2 THE COURT: So there's one other threshold issue  
3 that needs to be discussed before we get into whether the  
4 statements of the President are constitutionally protected, and  
5 that is the issue of timeliness. So there's an issue that was  
6 raised by the -- by Ms. Clifford, that assuming that the Texas  
7 statute applied, that because President Trump did not file the  
8 motion -- the anti-SLAPP motion within 60 days from the date of  
9 service, he's waived any opportunity to bring this motion. So  
10 is that claim being maintained, or is it withdrawn?

11 MR. IBRAHIM: Well, Your Honor, I have to confess,  
12 I'm a little bit confused here. Is this an anti-SLAPP motion  
13 still, or have they withdrawn the anti-SLAPP motion?

14 THE COURT: The Court has made a determination that  
15 the issue regarding whether the statements in the complaint are  
16 constitutionally protected should be analyzed under 12(b)(6).

17 MR. IBRAHIM: Okay.

18 THE COURT: Then we go to the issue of timeliness,  
19 and then we are going to get to the substance, but the issue --  
20 do you stand by the argument, or are you withdrawing that  
21 argument?

22 MR. IBRAHIM: Well, Your Honor, to be clear, we  
23 never made an argument that the 12(b)(6) portion of their  
24 motion was untimely. The assertion that we made was that the  
25 anti-SLAPP motion that they filed is untimely. So if we no

1 longer have an anti-SLAPP motion that is before the Court, then  
2 we will -- I suppose that argument would also go by the  
3 wayside. But if there is still an assertion that the  
4 anti-SLAPP motion applies, then, yes, we would be making an  
5 argument that the motion is untimely and that it should have  
6 been filed within 60 days.

7 THE COURT: I think we may be talking past each  
8 other. The motion here is in the nature of an anti-SLAPP, but  
9 because the motion only raises issue with the statement of  
10 Mr. Trump and whether that is constitutionally protected  
11 opinion, the Court can analyze that motion in the terms of  
12 12(b)(6) construct. So that's how I see the analysis going  
13 forward.

14 MR. IBRAHIM: Your Honor, our position is that the  
15 motion should have been filed within 60 days, and they didn't  
16 file it within 60 days; therefore, it's untimely.

17 THE COURT: Okay. So just in reference to the  
18 60-day rule, Texas law -- because we have to apply Texas law  
19 here, Texas law requires that a party bringing a motion, an  
20 anti-SLAPP motion, whether it's in the context of summary-  
21 judgment-type issue or whether it's a motion-to-dismiss-type  
22 issue, it has to be brought within 60 days. So I think the  
23 timeline here is important.

24 Ms. Clifford filed her complaint on April 30th of 2018.  
25 Mr. Trump waived service in May, about a month later, May 23rd,

1       2018, and then on 7/23, within the 60-day window, Mr. Trump  
2       filed a motion to transfer. And then on 8/8/2018, Judge Furman  
3       granted the joint stipulation and transfer. And so the motion  
4       that is brought before the Court is -- was filed on 8/27/2018,  
5       19 days after the transfer.

6           So what doesn't make sense to me is why the motion should  
7       have been filed within 60 days after the -- after Mr. Trump  
8       waived service? At that time the matter was pending before  
9       Judge Furman in the Southern District of New York. There was  
10      pending a motion to transfer, so it would make little sense to  
11      file the motion in New York when there was a motion to transfer  
12      that was pending. And so I guess I do not understand your  
13      argument as to why it's untimely.

14           MR. IBRAHIM: Yes, Your Honor. The argument is that  
15      there's a 60-day time limit.

16           THE COURT: Yes.

17           MR. IBRAHIM: Whether it made procedural sense or  
18       not, Your Honor, in our view is beside the point. It's very  
19       common, for example, when the defendant is asserting certain  
20      defenses, let's say, based on personal jurisdiction, that  
21      unless they get some type of a stipulation from the plaintiff  
22      to extend the deadline on various other motions that the  
23      defendant may want to bring, that that defendant is required to  
24      observe whatever time limits are necessary and to file all of  
25      their motions together. And that this case, it's no different.

1           If they wanted to file an anti-SLAPP motion, then the  
2 clock was ticking at the point in time when they waived  
3 service, and it was their responsibility, Your Honor, to bring  
4 the motion.

5           THE COURT: The clock -- the 60-day clock ticks if  
6 it makes sense for it to tick, and my point being that since  
7 the matter was pending in New York, and since Mr. Trump had  
8 filed a motion to transfer, and that issue had to be decided by  
9 Judge Furman under the circumstances there, Judge Furman would  
10 not have ruled on the anti-SLAPP issue because of the motion to  
11 transfer. And so under those circumstances, it makes a little  
12 sense to require a defendant to comply with the 60-day rule in  
13 light of those circumstances.

14           Separate and apart from that, Texas law is clear, and the  
15 proposition for this is *Schimmel versus McGregor* at 438 S.W.3d,  
16 but it stands for the clear proposition that the Court can  
17 waive the 60-day rule if good cause exists. And it would  
18 appear to require Mr. Trump to have filed the complaint -- the  
19 motion in New York when there was a motion to transfer pending,  
20 makes little sense.

21           And I would just suggest that under the circumstances  
22 here, there's good cause to allow the -- the motion to be filed  
23 when it was. And it was only filed 19 days after the transfer  
24 to this Court, so it was timely filed. And separate and apart  
25 from that, I see no prejudice to Ms. Clifford.

1           Is there any prejudice?

2           MR. IBRAHIM: Well, Your Honor, we didn't know that  
3 they were going to pursue an argument based on Texas law,  
4 Your Honor, until, really, four days before they filed the  
5 motion. There's a whole separate issue on whether there was a  
6 proper meet and confer, and that hasn't been, in fairness,  
7 brought before the Court. I'm not necessarily injecting that,  
8 but to respond to your question about whether there's  
9 prejudice, Your Honor, yes, there is prejudice because we were  
10 expected to drop everything on one-week notice to address a  
11 completely novel issue that they only brought to bear shortly  
12 after the case was transferred, so we do believe there is  
13 prejudice.

14          And, finally, Your Honor, our position is that the venue  
15 has no bearing on the 60-day requirement, whether we're in  
16 New York, California, or another forum. If they wanted to get  
17 an extension of time to file their anti-SLAPP motion, then they  
18 were required to either get a stipulation from the plaintiff or  
19 they were required to move before Judge Furman for an  
20 extension.

21           THE COURT: What's your position in reference to  
22 *Schimmel versus McGregor*, where applying Texas law, the Court  
23 has discretion to waive the 60-day rule where good cause  
24 exists?

25           MR. IBRAHIM: Well, our position is that the Court

1 should not exercise its discretion to find that good cause  
2 exists for all of the reasons I've recited. I'm not sure I'm  
3 going to, based on Your Honor's comments, I'm going to be able  
4 to persuade you otherwise, and for that reason, we can  
5 certainly move on with the rest of the argument.

6 THE COURT: Well, you can persuade me if you come  
7 forward with persuasive arguments. I'm open ears, you know,  
8 and I'm open to my mind being changed. But I think just under  
9 the circumstances here, if we just apply common sense, it  
10 didn't make sense for -- to require Mr. Trump to have filed a  
11 motion in New York because nothing would have been  
12 accomplished. And when the matter was transferred to this  
13 Court, they pursued filing the motion quickly, I guess, again,  
14 19 days after the transfer, which is relatively quick.

15 MR. IBRAHIM: Your Honor, again, we don't think that  
16 Judge -- the idea that Judge Furman would not be able to rule  
17 on the anti-SLAPP motion, I don't necessarily agree with that.  
18 I think that at the time that the motion to transfer was filed,  
19 it was certainly possible that that matter would have been  
20 fully briefed for Judge Furman and that Judge Furman would have  
21 denied the transfer and kept the case.

22 If that was the case, then why isn't it reasonable to  
23 assume that the defendant could have brought their motion at  
24 the same time? So the issue of venue having some kind of  
25 bearing on this motion, we are Monday-morning quarterbacking

1 after the fact because we all ended up before Your Honor. I  
2 don't think that's a reasonable position in terms of whether  
3 the defendant did what they should have done, which is get an  
4 extension from Judge Furman or get a stipulation from the  
5 plaintiff.

6 THE COURT: I'm not persuaded.

7 Mr. Harder, do you have any comments, just --

8 MR. HARDER: No, Your Honor.

9 THE COURT: Okay. Look, it makes sense not to  
10 apply -- not to use the 60-day rule as a sword here in light of  
11 the particular facts and the transfer to this Court and then  
12 the fact that the motion was expeditiously filed as soon as it  
13 was transferred here. So the Court would conclude that it's  
14 timely.

15 So we get to, I guess, the meat of all of the issues  
16 before the Court, and the question is whether the tweet by the  
17 President is protected commentary or political hyperbole and  
18 nondefamatory on its face. So the analysis of the anti-SLAPP  
19 motion under Texas law requires a couple of steps, and the  
20 Court is guided by *In re Lipsky* at 460 S.W.3d at 539 -- 579,  
21 I'm sorry.

22 And the first step is the defendant must show that  
23 plaintiff's complaint relates to or is in response to  
24 defendant's right of free speech. And so what is free speech  
25 in the context of Texas law and then certainly federal law or

1 constitutional law? So the TCPA defines exercise of free  
2 speech as a communication made in connection with a matter of  
3 public concern. And then a matter of public concern is defined  
4 further under the Texas statutes, and a matter of public  
5 concern includes an issue related to a public official or a  
6 public figure. And the statutes that apply here are Texas  
7 Civil Law Practice and Remedy Code.

8 So as -- and so what I would suggest is Texas applicable  
9 law is not inconsistent with the federal constitutional law  
10 that applies in the analysis here, but what I would ask counsel  
11 for the plaintiff here is it seems that there's little doubt  
12 here, it would appear, that Ms. Clifford's complaint in  
13 reference to Mr. Trump's tweet is one that involves Mr. Trump's  
14 exercise of free speech. He's a public official. He's  
15 President of the United States, doesn't get higher than that,  
16 so it's free speech by a public official on an issue of public  
17 concern.

18 This whole issue regarding the person who made the threats  
19 to Ms. Clifford was a matter of public interest involving a  
20 public figure. I think Ms. Clifford, by any measure, is a  
21 public figure. She's a movie actress. And separate and apart  
22 from that, she has, in the context of the lawsuit, one of the  
23 lawsuits before this Court and then other matters, she has  
24 appeared on various news shows, 60 Minutes being one, The View  
25 being another. And so it would appear that just looking at the

1 tweet here and in the context it was made, it appears to be one  
2 that would be protected as opinion and political hyperbole.

3 Separate and apart from that, I think the Court has to  
4 look at this in the context of who made it and why it was made.  
5 So we have Mr. Trump has issued the tweet or made the tweet in  
6 the context of plaintiff labeling herself as a political  
7 adversary of the President. She certainly is a political  
8 adversary of the President. She's made that clear in the  
9 context of the other complaint that was filed in this court,  
10 the complaint in 02217.

11 She was in the process of making her story known to the  
12 world, the relationship between -- the alleged relationship  
13 between herself and the President prior to the election in  
14 November 2016. She wanted the world to know about that in the  
15 context of the election that was taking place, to have the  
16 public be aware of the relationship.

17 So I think context matters, and it would appear that, by  
18 any measure, this would be the type of rhetorical hyperbole  
19 that is protected. And it would seem that this is the type of  
20 speech that really lies at the heart of the First Amendment  
21 to -- there was a prior motion made by Mr. Cohen to silence  
22 Mr. Avenatti here, which the Court denied.

23 And so I'm certainly a proponent of the First Amendment,  
24 but to allow the complaint to go forward and to have one  
25 consider this to be defamation in the context it was made would

1 be a chilling effect on candidates running for office,  
2 certainly a chilling effect on the President, and it would  
3 hamper political discourse.

4 This is the type of political discourse and the commentary  
5 that takes place in elections all the time. And I'm troubled  
6 that there's a claim here for defamation in the first instance.  
7 So I'll hear from Mr. Ibrahim on this issue.

8 And, again, there are numerous -- well, there's state --  
9 Texas state cases that discuss the issue of political  
10 commentary, and the courts have to be vigilant to protect  
11 issues involving First Amendment. And the Court is guided in  
12 part by *Rehak Creative Services versus Ann Witt* at  
13 404 S.W.3d 716. In that case there were various alleged  
14 defamatory remarks being made in the context of an election,  
15 but the statements included being ripped off, bilked. There  
16 was -- which were alleged to be defamatory. And the Court took  
17 the political context into -- considered the political context  
18 in deciding that those types of statements are protected.

19 So, Mr. Ibrahim.

20 MR. IBRAHIM: Thank you, Your Honor.

21 There's two main points I would like to make. First of  
22 all, Your Honor, our position is that the tweet at issue is  
23 100 percent absolutely a false statement in fact. And the test  
24 with regards to whether a particular statement is just mere  
25 opinion or hyperbole is the Court must ask itself whether the

1 statement at issue can be objectively verifiable. And here we  
2 have a statement from Mr. Trump with regards to our client's  
3 name, that she was threatened by this man in 2011, that this  
4 man is, quote/unquote, nonexistent.

5 Now, Your Honor, we agree, context is important, and let's  
6 look at the context at issue in this case. The context is that  
7 our client in 2011 was interviewed by In Touch magazine where  
8 she made some statements about her relationship with Mr. Trump.  
9 And our allegation is that the information that that interview  
10 took place made its way over to Mr. Trump's camp and to  
11 Mr. Cohen and so forth.

12 And the context does matter. This is not Mr. Trump  
13 commenting on an issue that he is detached from that could be  
14 construed as pure political opinion, where someone on the  
15 sidelines is commenting about a matter that he or she does not  
16 have personal knowledge about.

17 If it turns out that Mr. Trump was involved in some manner  
18 in sending this man, in hiring this man, in working with  
19 Mr. Cohen to send this man, if there was someone within the  
20 Trump organization who had some involvement in sending this  
21 man, we now take this tweet from being pure political opinion,  
22 and it is now elevated to being an objectively verifiable fact.

23 And if we are able to establish that, if the discovery  
24 shows that, then it's no longer a mere statement of opinion;  
25 it's a bald-faced lie. Because if Mr. Trump knew that this

1 threat actually occurred and that he sent this man, he had some  
2 involvement with the threat, it's not political opinion,  
3 Your Honor. That's a false statement of fact. It's not only a  
4 false statement of fact; it's actual malice, Your Honor.

5 And so this case -- and in support of this position, I  
6 would direct Your Honor to the *Bentley* opinion. The *Bentley*  
7 opinion -- if you will give me a moment, Your Honor. It's  
8 *Bentley versus Bunton*, B-u-n-t-o-n, 94 S.W.3d 561. It's a  
9 Texas Supreme Court opinion from 2002.

10 And in that case the Texas Supreme Court addressed the  
11 question of whether the accusation -- well, let me back up a  
12 second. That case involved a host of a call-in talk show on a  
13 public access channel who repeatedly accused a local district  
14 judge of being corrupt.

15 THE COURT: I have it right here.

16 MR. IBRAHIM: The host accused a local district  
17 judge of being corrupt. Now, "corrupt" is a word that's far  
18 more ambiguous than saying that a man is nonexistent, but in  
19 that action, the Texas Supreme Court addressed the question of  
20 whether the accusation that the plaintiff was corrupt  
21 constituted an opinion or statement of fact. And resolution of  
22 the issue hinged on the, quote/unquote, verifiability of the  
23 accusation and the context in which the accusations were made.  
24 And the Court found that that was defamatory.

25 Now, here, again, Your Honor, we have a tweet talking

1 about a nonexistent man, total con job. So it is a verifiable  
2 issue of fact whether my client is lying or not, and it is a  
3 verifiable question of fact whether Mr. Trump knew about it.  
4 So, Your Honor, that's the first point I want to make, that  
5 here we have a false statement of fact that is completely  
6 different from the context in which Your Honor is talking  
7 about, where you have a pure political opinion or hyperbole on  
8 a matter of public concern. That's number one.

9 THE COURT: Is the plaintiff an adversary --  
10 political adversary of the President?

11 MR. IBRAHIM: Well, that takes me to the second  
12 point, Your Honor.

13 THE COURT: The answer is "yes"?

14 MR. IBRAHIM: The answer is "no."

15 THE COURT: Why not?

16 MR. IBRAHIM: She has never described herself as a  
17 political adversary. I will give you, Your Honor, that, yes,  
18 she is an adversary of the President, but this idea that she is  
19 a political adversary, we don't agree with that. And let's  
20 take a look again at how this particular issue arose.

21 THE COURT: What do you mean she is an adversary of  
22 the President?

23 MR. IBRAHIM: Well, she is an adversary of the  
24 President in that she's been repeatedly described as a liar;  
25 she is not someone who has been telling the truth. And I think

1 the events of the last six, seven months, Your Honor, prove  
2 that everything that we've said has been absolutely true.

3 So in the sense that she's been repeatedly abused in the  
4 public with not only the statements coming out from Mr. Trump  
5 and his attorneys and all of Mr. Trump's surrogates contending  
6 that she's not telling the truth, contending that she's a bad  
7 person, saying things like what Mr. Giuliani said, that "I just  
8 don't respect a woman who comes from that profession,"  
9 absolutely she is an adversary, but I would take issue with --  
10 Your Honor, I apologize that I interrupted. I would take issue  
11 with Your Honor's characterization as a political adversary.  
12 She is not running for office. She hasn't declared her  
13 candidacy for any office within the United States.

14 And let's take a look at -- I'm sorry, Your Honor.

15 THE COURT: Go ahead.

16 MR. IBRAHIM: Let's look at the particular issue. I  
17 understand, Your Honor, it's easy to not have blinders on with  
18 regards to everything else that's going on, but the case that's  
19 before Your Honor, we have to look at the four corners of the  
20 complaint and the allegations before the Court. And the  
21 allegations that arose here relate to my client's assertion  
22 that she was threatened in 2011 by a man in Las Vegas who came  
23 to her car and basically told her to stop, to stop speaking  
24 out, and also made a veiled threat at her infant daughter at  
25 the time. That has nothing to do with politics.

1                   THE COURT: That's her claim.

2                   MR. IBRAHIM: That's her claim.

3                   And the claim with regards to the tweet at issue here  
4 relates back to this 2011 threat. That has nothing to do with  
5 politics. That has nothing to do with issues related to  
6 politics, Your Honor. It relates to whether Mr. Trump is a  
7 liar and whether his assertion that my client is a liar is true  
8 or not.

9                   So for those reasons, Your Honor, it's our position that  
10 this isn't mere political opinion or commentary. This is a  
11 false statement of fact, and that we intend to prove that it's  
12 a false statement of fact through the discovery in this case,  
13 Your Honor.

14                  THE COURT: So do you see the *Bentley* case at all  
15 being in a different context from the case before this Court?  
16 In *Bentley* there was a repeated accusation that the district  
17 judge was corrupt. And, again, context is everything. And one  
18 of the factors in *Bentley* is that it was repeated and repeated  
19 and repeated and repeated. So that's not what we have here,  
20 and we have something very different here, and a statement  
21 that's very different from the statement in *Bentley*.

22                  Let me ask you this: In your pleadings, I think you take  
23 the position that the defamation -- that the tweet is  
24 defamation, *per se*, because it essentially accuses Ms. Clifford  
25 of committing a crime.

1 MR. IBRAHIM: Yes, Your Honor.

2 THE COURT: Would you explain that? Because I don't  
3 understand the argument.

4 MR. IBRAHIM: Yes.

5 THE COURT: What crime was she being accused of  
6 committing?

7 MR. IBRAHIM: So it would be a crime to falsely  
8 report that a criminal act occurred.

9 THE COURT: Falsely report to who?

10 MR. IBRAHIM: Well, it would be a crime to assert  
11 that there was a false reporting a crime to, I presume, to a  
12 governmental authority, but I don't know that that necessarily  
13 would have to apply in this case because --

14 THE COURT: So this is not defamation, per se,  
15 because it's not a crime to report falsely to the world that  
16 someone has been verbally assaulted. It's a crime to file a  
17 false police report, but I don't see this as a defamation,  
18 per se.

19 MR. IBRAHIM: I don't know that the analysis is so  
20 narrow. So if a person is reporting that a crime has occurred  
21 to the public, to the general public as we have here, and she  
22 has a reasonable belief that there was a crime that occurred, I  
23 don't know that the analysis is necessarily that you have to  
24 meet all of the elements of the underlying crime that you are  
25 asserting that the other side is claiming that you engaged in.

1 I don't know that that's the analysis, Your Honor.

2 THE COURT: Thank you.

3 Mr. Harder, do you have any comments?

4 MR. HARDER: Yes, Your Honor.

5 It's interesting because the complaint initially says that  
6 the crime was the false reporting to the public, which we've  
7 pointed out, Your Honor, is not a crime. We looked to the  
8 statutes. We found it out of statute that says you have to go  
9 to law enforcement in order for that to be a crime. If you  
10 just say it to the public in general, it's not a crime.

11 We have not seen any criminal statutes from the  
12 plaintiff's side to indicate what crime actually is being  
13 accused as to Ms. Clifford. The opposition says, well, okay,  
14 also the tweet says "con job," so they provided a definition of  
15 "con job," which they get, I think, from the Black's  
16 dictionary, and that definition -- if I can find it here.

17 That definition is essentially somebody who -- I don't  
18 have the specific reference, but somebody who engages in  
19 causing someone to trust in them and gain their confidence and  
20 then take money or property away from them; a swindler. This  
21 is not what this tweet is accusing Ms. Clifford of doing.

22 This tweet is hyperbolic. It is not accusing her of  
23 engaging in the crime of theft. It is not accusing her of  
24 engaging in con artistry. What it says is "A total con job  
25 playing the fake news media for fools, but they know it."

1 That's actually very far from accusing her of con artistry.  
2 Because what this tweet is saying is that she's going to the  
3 news media with a story and treating them like they're a bunch  
4 of fools, but they are not being tricked by it because they  
5 know it. So there's no trickery involved; they already know.  
6 So this is as far from an accusation of actual con artistry as  
7 possible.

8 To circle back, in order for there to be an accusation of  
9 a crime, you have to show the statute -- Mr. Ibrahim doesn't  
10 think you have to show the statute -- and you have to show the  
11 elements. Well, I think you do. I think you have to show  
12 which criminal statute is being alleged, what are the elements,  
13 and how is this tweet actually alleging she's committing a  
14 crime? That's not doing that at all. It's a long stretch for  
15 the plaintiff to allege that this tweet, which is hyperbolic,  
16 exaggerated, done within the political realm to address,  
17 Your Honor, about the politics of it all.

18 Mr. Avenatti, as of the time of the tweet, went on a  
19 hundred different TV shows. And I realize we are not looking  
20 at the evidence, but Your Honor could take judicial notice of  
21 things, and Your Honor's been part of this case for a while,  
22 and we have -- you know, we've dealt with some of the evidence  
23 in the case.

24 Mr. Avenatti went on a hundred different national news  
25 shows and attacked the President of the United States over and

1 over and over and over again, and Ms. Clifford went on news  
2 shows and attacked him as well. And his response was a single  
3 tweet, which we've read already a couple of times, saying  
4 "You're playing the news media as fools. It's a con job. They  
5 know it. Nonexistent man sketch years later," and referring to  
6 the side-by-side of the sketch and a picture of Ms. Clifford's  
7 either estranged husband or ex-husband.

8 And this whole thing is an opinion. It's the President's  
9 opinion that this person who is depicted in the sketch or  
10 alleged person is nonexistent based on the fact that he looks  
11 like her ex-husband. It's her opinion that this story is a con  
12 job, playing the fake news media for fools. It's his opinion  
13 that the news media know that they are being played. These are  
14 all opinions. These are not facts, and this is all done in  
15 this hyperbolic context of the political realm.

16 I believe Your Honor pointed out that *Bentley* involved a  
17 situation where this individual on a radio show said flat out  
18 that a particular judge was corrupt, and he alleged it over and  
19 over and over again. And the allegations were that this  
20 commentator had actual facts, and he pointed to specific cases  
21 and specific occurrences in the Court's record and public  
22 documents and he says that he made lengthy investigations.

23 He interviewed courthouse employees and others, and he  
24 looked into the law pertaining to personal bonds and case  
25 disposition guidelines and judicial ethics and sheriff's

1 responsibilities and the district court's supervisorial  
2 responsibility over the county auditor and the county  
3 commissions court, and over and over and over again, this was a  
4 sustained attack where the speaker was communicating to the  
5 public that he was speaking from a position of fact, from a  
6 position of evidence, from a position of conviction, from  
7 someone who has investigated and investigated --

8 THE COURT: I agree that the *Bentley* case is very  
9 different.

10 MR. HARDER: It couldn't be further from our case.

11 THE COURT: Yes. Let's -- the Court is going to  
12 take the issues under submission and further consider. But how  
13 do you see the issue of attorney's fees, Mr. Harder?

14 MR. HARDER: We are requesting them.

15 THE COURT: And then in reference to there's a  
16 request to amend -- to provide leave to amend the complaint.

17 MR. HARDER: Your Honor, we would oppose because the  
18 tweet sets forth what the tweet sets forth, and the allegation  
19 is that it's a defamation. And our position, which we've laid  
20 out in our papers, is that it's not a defamation at all; that  
21 this is opinion, it's protected speech, that it's within the  
22 political context, that it's rhetorical hyperbole. And there  
23 are case after case after case which show that this is  
24 protected speech.

25 The *Greenbelt* case versus *Bresler* is a case that

1 Your Honor should take a close look at, if you haven't already.  
2 That was a case where a real estate developer was accused of  
3 blackmail twice by people in the community, and it was repeated  
4 in two news stories. The case went to trial, and this  
5 gentleman won a judgment for compensatory and punitive damages,  
6 and it was affirmed by the highest court in his state, which  
7 was Maryland, the court of appeal, and the case went to the  
8 Supreme Court.

9 And the Supreme Court reversed, and it said the word  
10 "blackmail" was used in a hyperbolic setting. He actually  
11 wasn't being accused of the crime of blackmail; he was being  
12 accused of being a very hard-nosed business negotiator, kind of  
13 a take-no-prisoners business negotiator, and he was being  
14 likened to somebody who commits blackmail.

15 And even though all of the courts of Maryland sided with  
16 the defamation claim, the U.S. Supreme Court said, and I will  
17 quote: "No reader could have thought that either the speakers  
18 at the meetings or the newspaper articles reporting the words  
19 are charging Bresler with the commission of a criminal offense.  
20 On the contrary, even the most careless reader must have  
21 perceived that the word, 'blackmail,' was no more than  
22 rhetorical hyperbole, a vigorous epithet used by those who  
23 considered Bresler's negotiating position extremely  
24 unreasonable."

25 Well, that's what we have here with the word "con job,"

1 not accusing them of a crime -- Ms. Clifford of a crime, just  
2 saying this whole thing is trying to fool the media. That's  
3 the essence of it, and it's opinion. It's opinion she's trying  
4 to fool the media. The media is going along with it, and the  
5 President is essentially saying rubbish or hogwash or calling  
6 BS, there are various ways of saying it. And the President  
7 uses the words that he chooses, and it's all protected free  
8 speech.

9       And, Your Honor, *Letter Carriers versus Austin* is an  
10 important case because the plaintiff was called a traitor, and  
11 he was called a scab in the context of a labor dispute. And  
12 the Supreme Court held there, there's no such thing as a false  
13 idea. Even pernicious -- however pernicious an opinion may  
14 seem, we depend for its correction not on the conscientious of  
15 judges and juries, but on the competition of other ideas.

16       And what we have here is a political feud going on between  
17 the two sides, where the President's being attacked by  
18 Mr. Avenatti, acting on Ms. Clifford's behalf in a hundred  
19 different TV shows, and he sends out a tweet responding to some  
20 of the things that he's hearing. It's a give and take. And  
21 what the Supreme Court is saying is that the remedy here is  
22 more speech.

23       Ms. Clifford could have said, "Oh, it actually did happen,  
24 and here is my evidence. Here are the people I talked to.  
25 Here's the e-mails I sent or the text messages I sent. Here,

1 look, look, World, I'm telling the truth. I'm not telling a  
2 lie," but she didn't do that. She just decided she's going to  
3 sue for defamation without saying one more word about the truth  
4 or falsity of this, and that's not what the Court says.

5         *The New York Times v Sullivan* case, I read it again  
6 yesterday, there's so much in that case that's just right on  
7 point talking about the importance of communication and free  
8 speech and discussions on issues of importance and that  
9 defamation actions are not the way to go.

10         This is a case where an elected official had sued for  
11 defamation and won and got a \$500,000 judgment back in the  
12 1960s, which was a lot of money, and it was upheld by the  
13 highest court of the state. And the U.S. Supreme Court  
14 reversed it unanimously, and they talked quite a bit about the  
15 importance of having free political speech.

16         It reminds me of what Evelyn Beatrice Hall said: "I  
17 disprove of what you say, but I will defend to your [sic] death  
18 your right to say it." And, Your Honor, the framers of the  
19 constitution insisted on adding ten amendments to the  
20 constitution. The very first one says "Congress shall make no  
21 law abridging the freedom of speech." Speech is so important  
22 that U.S. Congress can't even touch it. You can't enact a law  
23 that restricts it. That's how important this is.

24         And if you look at the Supreme Court cases that we have  
25 cited to, Your Honor, it's pretty overwhelming. I think I'm

1       singing to the choir because Your Honor started out by saying  
2       you understand the importance of freedom of speech, especially  
3       in the political context. And if you look at the cases of  
4       political context, it's given the most liberal view of speech,  
5       that you have to have free speech in political context,  
6       otherwise it leads down a dangerous path.

7           I hope I've answered your question. And thank you,  
8       Your Honor.

9           THE COURT: Yes, sir.

10          MR. AVENATTI: Thank you, Your Honor.

11          Your Honor, I'm going to correct the record because  
12       there's been a number of misstatements on the record. To be  
13       clear, my client at the time of this tweet had given two  
14       interviews on television, two: the 60 Minutes piece and her  
15       appearance on The View, which was, I believe, the day before  
16       the tweet.

17          Your Honor, this was not political by any stretch of the  
18       imagination at the time of this tweet. It had nothing to do  
19       with politics. It had nothing to do with an election. In  
20       fact -- and my recollection may be wrong about this, but I  
21       believe on at least one of those interviews, she was asked her  
22       position relating to Donald Trump as a President, and she did  
23       not pass judgment on her opinion of Donald Trump as a  
24       President.

25          Now, the Supreme Court has taught us in *Clinton v Jones*,

1       in a unanimous decision, Your Honor, that the President is an  
2       individual, just like everyone else, as it relates to  
3       pre-presidential conduct and facts in evidence relating to that  
4       conduct. Donald Trump was not commenting by way of this tweet  
5       on anything having to do with a political election or anything  
6       having to do with politics. Now, the fact that I may have  
7       given a number of television interviews does not change that  
8       analysis.

9           Let me presuppose -- or let us presuppose, Your Honor, for  
10      a moment that this was a case not against Donald Trump, but  
11      against a high-profile celebrity like LeBron James or a  
12      high-profile business person like Bill Gates or Warren Buffett.  
13      That would not -- the conduct here would not be any different,  
14      Your Honor. What if we were seeing Warren Buffett and I went  
15      on television 250 times. Would that make -- would those  
16      appearances make the dispute about politics? Of course it  
17      would not. This had nothing to do with politics.

18           THE COURT: Mr. Avenatti, the Court has to focus on  
19      the allegations contained in the complaint and the tweet  
20      itself. And let me just say, in the Court's view, this appears  
21      to be rhetorical hyperbole opinion, protected speech in the  
22      context of political arena by a public official involving a  
23      public figure involving matters of public concern. So it  
24      appears to be protected. That being said, the Court will look  
25      at the additional cases that have been cited here.

1           We move to the issue of whether you should be entitled to  
2 amend if the Court grants the motion.

3           MR. AVENATTI: And, Your Honor, we would stand on  
4 our submission in the papers; namely, we would ask for an  
5 opportunity to amend the complaint.

6           THE COURT: Now, how would you amend it so that you  
7 have a viable complaint here?

8           MR. AVENATTI: Well, Your Honor, I believe that we  
9 made notation in our papers as to how we amend it, but among  
10 other things, Your Honor, I think that we can shore up the  
11 malice allegations. I think we can provide context for the  
12 statement to show that, in fact, it was not political in nature  
13 at the time that it was made.

14           THE COURT: Thank you.

15           MR. AVENATTI: Thank you.

16           THE COURT: We are going to take a short recess, and  
17 then we will go back to the issue of the scheduling conference.

18           THE COURTROOM DEPUTY: The Court's in recess.

19           (Recess taken from 3:17 p.m. to 3:23 p.m.)

20           THE COURTROOM DEPUTY: Please come to order. This  
21 court is once again in session.

22           THE COURT: So we are going to address the issues in  
23 02217, Stephanie Clifford versus Trump. And the parties have  
24 filed various pleadings regarding the scheduling conference  
25 that's set for today. And in the pleadings there are various

1 issues that have been raised that appear not to be appropriate  
2 to address in the context of a scheduling conference.

3 In the filings there's a suggestion that Ms. Clifford's  
4 lawsuit is now moot. In particular, defendants Donald Trump  
5 and Essential Consultants seemingly have or will consent to  
6 rescind the settlement agreement. More importantly, there's an  
7 indication that they would covenant not to seek to enforce the  
8 settlement agreement. So the issue before the Court -- one  
9 issue before the Court that has to be decided is whether there  
10 is a case in controversy that remains, and so that issue should  
11 be teed up in reference to a motion brought to the Court. So  
12 the Court would require the defendants to bring that motion and  
13 require the plaintiffs to file an opposition.

14 And then in reference to Mr. Cohen, Mr. Cohen remains to  
15 be sentenced. That being said, Mr. Cohen has previously  
16 noticed a motion and a special motion to strike plaintiff's  
17 defamation case. I don't believe that has been opposed or  
18 responded to yet in light of the stay that has been in place.  
19 So we need to set a schedule regarding the opposition. And the  
20 Court, after ruling on the motions, if there's a matter that  
21 remains, that we could set a trial date thereafter.

22 So today the Court is going to set a scheduling conference  
23 order, but the scheduling conference order is going to concern,  
24 again, whether there is a case in controversy that remains  
25 concerning the dec relief, and then we need to schedule

1 hearings and oppositions on Mr. Cohen's motion to dismiss.

2 So who wishes to be heard on this? I guess we start with  
3 counsel for Essential Consultants and Donald Trump. We need a  
4 motion.

5 MR. BLAKELY: I agree, Your Honor, and I think we  
6 should set a briefing schedule.

7 THE COURT: Do you have one to propose? Because I'm  
8 open to it.

9 MR. BLAKELY: I will just fly by the seat of my  
10 pants. For the motion that's for subject matter jurisdiction,  
11 which is what the motion would be, I would request that we have  
12 one and file it in two weeks and then run the opposition off of  
13 that pursuant to Local Rule 7-3.

14 THE COURT: Well, does -- Mr. Avenatti, do you need  
15 additional time? How do you want to proceed here?

16 MR. AVENATTI: Yes Your Honor, we would like  
17 additional time. That would give them two weeks to file the  
18 motion, only give us a week. So I would like two weeks to file  
19 our opposition to the motion.

20 THE COURT: Okay. So let's get -- let me get from  
21 the clerk a date to file the motion to dismiss plaintiff's dec  
22 relief judgement cause of action for lack of subject matter  
23 jurisdiction, and that should be filed within two weeks.

24 May I have a date from the clerk?

25 THE COURTROOM DEPUTY: Yes, Your Honor. That would

1 be Monday, October the 8th, 2018.

2 THE COURT: Then we need a date for opposition.

3 Exclude that first date and have a two-week date thereafter.

4 THE COURTROOM DEPUTY: So I believe you want it on a  
5 Tuesday, Tuesday, October the 23rd, 2018.

6 THE COURT: So it looks like October 8th for the  
7 filing of the motion and then October 23rd for the opposition.

8 And then we need a reply date. The reply should be five  
9 days thereafter.

10 Yes, Mr. Avenatti?

11 MR. AVENATTI: Yes, Your Honor. I would actually  
12 make a request that we have until Friday the 26th because we  
13 have an extensive briefing due in the Ninth Circuit on the  
14 20 -- around about the same time right now.

15 THE COURT: Then the opposition would be due on or  
16 before Friday, October 26th, 2018.

17 MR. AVENATTI: Thank you, Your Honor.

18 THE COURT: And then we need a reply five days  
19 thereafter.

20 THE COURTROOM DEPUTY: Do you want Friday -- the  
21 following Friday, Your Honor?

22 THE COURT: Five days.

23 THE COURTROOM DEPUTY: Five business days. Okay.  
24 That would be Wednesday, November the 7th.

25 THE COURT: Okay. And then we can set a hearing on

1 that two weeks to follow.

2 THE COURTROOM DEPUTY: That will be Monday, November  
3 the -- actually, that would be Monday, November the 26th, 2018,  
4 Your Honor. That's when we return from Thanksgiving. Do you  
5 want it that week, or do you want it the week prior?

6 THE COURT: Does that work? November 26 is probably  
7 not a good time. I'm scheduled to actually be on jury duty the  
8 week of the 19th. The state court has called.

9 So let's do it the next available.

10 THE COURTROOM DEPUTY: That would be Monday,  
11 November -- excuse me, Monday, December the 3rd, 2018.

12 Do you want it at 10:00 or 2:00, Your Honor?

13 THE COURT: At 10:00.

14 Okay. And then we have Mr. Cohen's filed motion, the one  
15 he's already filed regarding a motion to strike the plaintiff's  
16 defamation cause of action, and so we need opposition to that.

17 Do you want the opposition the same date?

18 MR. AVENATTI: Your Honor, let me make a suggestion,  
19 if the Court would be so inclined, which is why don't we just  
20 have the opposition due on the same day, we can have the reply  
21 due on the same date, and the Court could hear all of the  
22 motions on the same date.

23 THE COURT: Perfect.

24 Agreed?

25 MR. BLAKELY: Agreed, Your Honor.

1 MR. HARDER: Yes.

2 THE COURT: Is there anything else to discuss in  
3 terms of the scheduling in CV 02217? None?

4 MR. BLAKELY: Nothing from Mr. Cohen or Essential  
5 Consultants.

6 THE COURT: Thank you very much. It's been a  
7 pleasure.

8 MR. HARDER: Thank you, Your Honor.

9 THE COURTROOM DEPUTY: The Court is in recess.

10 (Proceedings concluded at 3:31 p.m.)

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## **CERTIFICATE OF OFFICIAL REPORTER**

3 COUNTY OF LOS ANGELES )  
4 STATE OF CALIFORNIA )

I, CAROL JEAN ZURBORG, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the judicial conference of the United States.

15  
16 Date: October 2, 2018

/s/ CAROL JEAN ZURBORG

CAROL JEAN ZURBORG, CSR NO. 7921, CCRR, RMR  
Federal Official Court Reporter